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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN DIEGO

11 EVELYN WIMBERLEY,
12 Plaintiff,
13 v.
14 LOWES HIW INC., et al.
15 Defendants,
16

Case No. 37-2016-00008397

**STIPULATION FOR ENTRY OF
CONSENT JUDGMENT AS TO
DEFENDANTS SHINERICH
INDUSTRIAL, LTD. & SHINERICH
INTERNATIONAL, INC.**

1
2 **1. INTRODUCTION**

3 1.1 **The Parties.** This Consent Judgment is entered into by and between Evelyn
4 Wimberley acting on behalf of the public interest (hereinafter "Wimberley"), and Shinerich
5 Industrial, Ltd. and Shinerich International, Inc. (collectively hereinafter "Shinerich"), with
6 Wimberley and Shinerich collectively referred to as the "Parties" and each of them as a "Party."
7 Wimberley is an individual residing in California who seeks to promote awareness of exposures
8 to toxic chemicals and improve human health by reducing or eliminating hazardous substances
9 contained in consumer products. Wimberley served a 60 Day Notice dated June 15, 2015. An
10 Amended Notice will be filed within 30 days of the parties signatures herein. Both Shinerich
11 Industrial, Ltd. and Shinerich International, Inc. employ ten or more persons and are a "person in
12 the course of doing business" for purposes of Proposition 65, Cal. Health & Safety Code §§
13 25249.6 et seq.

14 1.2 **Allegations and Representations.** Wimberley alleges that Shinerich has offered
15 for sale in the State of California and has sold in California, outdoor fire pits and heaters that
16 expose individuals to carbon monoxide and soot, and that such sales have not been accompanied
17 by Proposition 65 warnings. Carbon monoxide and soot are listed under Proposition 65 as
18 chemicals known to the State of California to cause birth defects or other reproductive harm.
19 Wimberley specifically identified in her initial 60 Day Notice the Garden Treasures Fire Pit (UPC
20 883432102067) as an example of the category of product within the outdoor/heaters category that
21 are subject to the allegations.

22 1.3 **Notices of Violation/Complaint.** On or about June 30, 2015, Wimberley served
23 Lowe's Home Centers, LLC (incorrectly identified in the complaint as separate entities Lowe's
24 HIW and LG Sourcing) (hereinafter "Lowe's") and various public enforcement agencies with a
25 document entitled "60-Day Notice of Violation" pursuant to Health & Safety Code §25249.7(d)
26 (the "Notice"), alleging that Lowe's was in violation of Proposition 65 for failing to warn
27 consumers and customers that the Covered Products exposed users in California to carbon
28 monoxide and soot. The Covered Products sold by Lowe's are manufactured by Shinerich

1 Industrial, Ltd. and are distributed in the United States by Shinerich International, Inc. No public
2 enforcer diligently prosecuted the claims threatened in the Notice within sixty days plus service
3 time relative to the provision of the Notice to them by Wimberley, such that Wimberley filed a
4 complaint in the matter as captioned above on March 14, 2016. Subsequently, and pursuant to
5 negotiations regarding settlement of this matter, Wimberley will send the Amended 60 Day
6 Notice letter to Shinerich, International, Inc. (hereafter "Shinerich" or "the Settling Defendant")
7 within 30 days of the Parties executing this Agreement.

8 1.4 In the event that no public enforcer undertakes diligent enforcement of the
9 allegations set forth for the covered products as specified in the Amended 60 Day Notice prior to
10 the expiration of the 60 Day Notice period, the complaint in this matter shall be amended to add
11 Shinerich International, Inc. as a defendant.

12 1.5 The parties shall stipulate to an extension pursuant to California law for
13 Defendants to file and serve their responsive pleadings if any, and in no event shall Plaintiff seek
14 a default judgment against Defendants Shinerich International Inc., for any failure to file and
15 serve their responsive pleadings.

16 1.6 This Consent Judgment will not be submitted to the court until such time as the 60
17 day notice served upon Shinerich has expired and the complaint currently filed with the court is
18 amended to include Shinerich as a defendant

19 1.7 For purposes of this Consent Judgment only, the Parties stipulate that this Court
20 has jurisdiction over Shinerich as to the allegations contained in the complaint filed in this matter,
21 that venue is proper in the County of San Diego, and that this Court has jurisdiction to approve,
22 enter, and oversee the enforcement of this Consent Judgment as a full and final binding resolution
23 of all claims which were or could have been raised in the Complaint based on the facts alleged
24 therein and/or in the Notices. The parties further agree, and without admitting liability, that all
25 covered products within the outdoor/heaters product category that are sold now or in the future by
26 Shinerich and other downstream retail establishments, within the state of California are subject to
27 this Consent Judgment whether they were identified in the 60 Day Notice or Amended Notice or
28

1 not.

2 1.8 Lowe's and Shinerich deny the material allegations contained in Wimberley's
3 Notice and Complaint and maintain that they have not violated Proposition 65. Nothing in this
4 Consent Judgment shall be construed as an admission by Lowe's or Shinerich of any fact, finding,
5 issue of law, or violation of law; nor shall compliance with this Consent Judgment constitute or
6 be construed as an admission by Lowe's or Shinerich of any fact, finding, conclusion, issue of
7 law, or violation of law, such being specifically denied by Lowe's and Shinerich. However, this
8 section shall not diminish or otherwise affect the obligations, responsibilities, and duties of
9 Shinerich under this Consent Judgment.

10 **2. DEFINITIONS**

11 2.1 **Complaint.** The term "Complaint" shall have the meaning given in Section 1.3.

12 2.2 **Covered Products.** The term "Covered Products" refers to the outdoor/heaters
13 product category which includes fire pits and heaters that are imported, manufactured, sold, or
14 distributed for sale in California by Shinerich, including, but not limited to, all of the following:

- 15 (a) Garden Treasures 30" Steel Fire Pit. (Item #91765)
- 16 (b) Garden Treasures Large Bowl Fire Pit (Item #574460)
- 17 (c) Garden Treasures 35" Steel Fire Pit (Item #749279)
- 18 (d) Garden Treasures Chiminea with Cover (Item #291623)
- 19 (e) 47" Chiminea with Brushed Bronze Finish (Item # 7105943)

20
21 2.3 **Effective Date.** The term "Effective Date" shall mean the date this Consent
22 Judgment is entered as a Judgment of the Court.

23 2.4 **Listed Chemicals:** The term "Listed Chemicals" shall mean carbon monoxide and
24 soot.

25 2.5 **Notice.** The term "Notice" shall have the meaning given in Section 1.3.

26 2.6 **Releasees.** The terms "Defendant Releasees" and "Downstream Defendant
27 Releasees" shall have the meanings given in Section 5.1.

1 2.7 **Execution Date.** The term "Execution Date" shall mean the date this Consent
2 Judgment is signed by the parties

3 3. **INJUNCTIVE RELIEF: WARNINGS**

4 3.1 Commencing on the Effective Date, Shinerich shall not sell, offer for sale, or ship
5 for sale in California any Covered Product, unless the Covered Product is accompanied by the
6 following warning: "**WARNING: This product contains, or the use of this product releases,**
7 **chemicals known to the State of California to cause cancer and birth defects or other**
8 **reproductive harm.**"

9 3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the
10 Covered Product's packaging, labeling, or instruction booklet. The warning shall be prominently
11 affixed to or printed on the packaging, labeling, or instruction booklet and displayed with such
12 conspicuousness, as compared with other words, statements, or designs as to render it likely to be
13 read and understood by an ordinary individual under customary conditions of purchase or use. A
14 warning may be contained in the same section of the packaging, labeling, or instruction booklet
15 that states other safety warnings, if any, concerning the use of the product and shall be at least the
16 same size as those other safety warnings.

17 4. **MONETARY TERMS**

18 4.1 **Civil Penalty.** Shinerich shall pay a civil penalty of \$2,500.00 pursuant to Health
19 and Safety Code section 25249.7(b), to be apportioned in accordance with California Health &
20 Safety Code § 25192, with 75% of these funds remitted to the State of California's Office of
21 Environmental Health Hazard Assessment and the remaining 25% of the penalty remitted to
22 Wimberley, as provided by California Health & Safety Code § 25249.12(d).

23 4.2 **Attorney Fees.** Shinerich agrees to pay and will not oppose an application made
24 by Wimberley's counsel for an award of attorney fees, inclusive of all expenses and costs
25 incurred as a result of investigating, bringing this matter to Shinerich attention, litigating and
26 negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to Code
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1 of Civil Procedure section 1021.5, in an amount of \$25,500.00 Other than the payment required
2 hereunder, each side is to bear its own attorneys' fees and costs.

3 4.3 Shinerich shall mail or wire Wimberley's counsel the total sum of \$28,000.00
4 representing the civil penalty and attorney fees in Sections 4.1 and 4.2 within two days following
5 receipt of a fully-executed copy of this Consent Judgment, W-9, and wire instruction information
6 from Wimberley's counsel.

7 4.4 At the time the consent judgment is approved by the court, Lowe's will be
8 dismissed from this action—with prejudice—effective as to the Covered Products that Shinerich
9 shipped before the effective date of this judgment.

10 **5. RELEASE OF ALL CLAIMS**

11 5.1 This consent judgment is a full, final, and binding resolution between Wimberley
12 acting in the public interest, and Shinerich, it's parents, shareholders, divisions, subdivisions,
13 subsidiaries, partners, sister companies, and affiliates, and their successors and assigns
14 ("Defendant Releasees"), and all entities from whom they obtain and to whom they directly or
15 indirectly distribute or sell Covered Products, including but not limited to manufacturers,
16 suppliers, distributors, wholesalers, customers, licensors, licensees retailers, franchisees, and
17 cooperative members, including but not limited to Lowe's, its parent and all subsidiary
18 companies, and affiliates thereof, their respective employees, agents, and assigns ("Downstream
19 Defendant Releasees"), of all claims for violations of Proposition 65 based on exposure to Listed
20 Chemicals from Covered Products as set forth in the Notice, with respect to any Covered
21 Products manufactured, distributed, or sold by Shinerich prior to the Effective Date. Compliance
22 with the terms of this consent judgment constitutes compliance with Proposition 65 with regard to
23 the Covered Products. Shinerich shall date stamp the Covered Products or otherwise provide
24 sufficient documentation to Wimberley that it is in compliance.

25 5.2 In addition to the foregoing, Wimberley, on behalf of herself, her past and current
26 agents, representatives, attorneys, and successors and/or assignees, and not in her representative
27 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
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1 legal action and releases any Defendant Releasees, and Downstream Defendant Releasees from
2 any and all manner of actions, causes of action, claims, demands, rights, suits, obligations, debts,
3 contracts, agreements, promises, liabilities, damages, charges, losses, costs, expenses, and
4 attorneys' fees, of any nature whatsoever, known or unknown, in law or equity, fixed or
5 contingent, now or in the future, with respect to any alleged violations of Proposition 65 related to
6 or arising from Covered Products manufactured distributed or sold by Lowe's or Shinerich or
7 Defendant Releasees. With respect to the foregoing waivers and releases in this paragraph,
8 Wimberley hereby specifically waives any and all rights and benefits which she now has, or in the
9 future may have, conferred by virtue of the provisions of Section 1542 of the California Civil
10 Code, which provides as follows:
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12 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
13 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR
14 AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY
THE DEBTOR.

15 5.3 Shinerich waives any and all claims against Wimberley, her attorneys and other
16 representatives, for any and all actions taken or statements made (or those that could have been
17 taken or made) by Wimberley and her attorneys and other representatives, whether in the course
18 of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this
19 matter, and/or with respect to Covered Products.

20 6. INTEGRATION

21 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
22 any and all prior negotiations and understandings related hereto shall be deemed to have been
23 merged within it. No representations or terms of agreement other than those contained herein
24 exist or have been made by any Party with respect to the other Party or the subject matter hereof.

25 7. GOVERNING LAW

26 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
27 California and apply within the State of California. In the event that Proposition 65 is repealed or
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1 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
2 Shinerich shall provide written notice to Wimberley of any asserted change in the law, and shall
3 have no further obligations pursuant to this Consent Judgment with respect to, and to the extent
4 that, Covered Products are so affected.

5 **8. NOTICES**

6 8.1 Unless specified herein, all correspondence and notices required to be provided
7 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i)
8 first-class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any
9 party by the other party at the following addresses:

10 For Shinerich:

11 Elizabeth Flachsbart
12 Balch & Bingham, LLP
13 1901 Sixth Ave North, Suite 1500
14 Birmingham, AL 35203-4642
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1 and

2 For Wimberley:

3 Stephen Ure
4 Law Offices of Stephen Ure, PC.
5 11622 El Camino Real, Suite 100
6 San Diego, California 92130

7 Any party, from time to time, may specify in writing to the other party a change of address to
8 which all notices and other communications shall be sent.

9 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

10 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
11 which shall be deemed an original, and all of which, when taken together, shall constitute one and
12 the same document.

13 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)/COURT**
14 **APPROVAL**

15 10.1 Wimberley agrees to comply with the requirements set forth in California Health
16 & Safety Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent
17 Judgment and Shinerich agrees it shall support approval of such Motion.

18 10.2 This Consent Judgment shall not be effective until it is approved and entered by
19 the Court and shall be null and void if, for any reason, it is not approved and entered by the Court
20 within twelve months after it has been fully executed by the Parties. In such case, the Parties
21 agree to meet and confer on how to proceed and if such agreement is not reached within 30-days,
22 any monies that have been paid pursuant to Section 4 shall be refunded and the case shall proceed
23 on its normal course.

24 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
25 appellate court, the Parties shall meet and confer as to whether to modify the terms of this
26 Consent Judgment. If the Parties do not jointly agree on a course of action to take, any monies
27 that have been paid pursuant to Section 4 shall be refunded within 15 days after remittitur to the
28 trial court, and the case shall proceed on its normal course on the trial court's calendar.

1 **11. MODIFICATION**

2 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
3 and the approval of the Court or upon the granting of a motion brought to the Court by either
4 Party.

5 **12. ATTORNEY'S FEES**

6 12.1 A party who unsuccessfully brings or contests an action arising out of this Consent
7 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs
8 unless the unsuccessful party has acted with substantial justification. For purposes of this
9 Consent Judgment, the term substantial justification shall carry the same meaning as used in the
10 Civil Discovery Act of 1986, Code of Civil Procedure Section 2016, et seq.

11 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
12 pursuant to law.

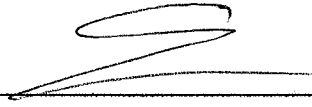
13 **13. RETENTION OF JURISDICTION**

14 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
15 Consent Judgment.

16 **14. AUTHORIZATION**

17 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of
18 their respective Parties and have read, understood and agree to all of the terms and conditions of
19 this document and certifies that he or she is fully authorized by the Party he or she represents to
20 execute the Consent Judgment on behalf of the Party represented and legally bind that Party.
21 Except as explicitly provided herein each Party is to bear its own fees and costs.
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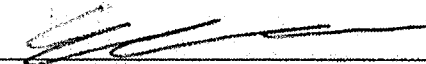
APPROVED AS TO FORM:

AGREED TO: Date: <u>June 14</u> , 2016 By: <u></u> On Behalf of Evelyn Wimberley Stephen Ure, Law Offices of Stephen Ure, PC	AGREED TO: Date: _____, 2016 By: _____ On Behalf of Shinerich Industrial, Ltd. & Shinerich International, Inc. Elizabeth Flachsbart Balch & Bingham, LLP
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IT IS HEREBY SO STIPULATED:

AGREED TO:

Date: 6-14-16

By: 
EVELYN WIMBERLEY

AGREED TO:

Date: _____

By: _____
SHINERICH INDUSTRIAL, LTD.
SHINERICH INTERNATIONAL, INC.

1
2 APPROVED AS TO FORM:

3 AGREED TO:

4 Date : _____, 2016

5
6 By: _____

7 On Behalf of Evelyn Wimberley
8 Stephen Ure,
Law Offices of Stephen Ure, PC

AGREED TO:

Date: June 16, 2016

By: _____

On Behalf of Shinerich Industrial, Ltd. &
Shinerich International, Inc.
Elizabeth Flachsbart
Balch & Bingham, LLP

9
10 IT IS HEREBY SO STIPULATED:

11 AGREED TO:

12
13 Date: _____

14 By: _____
15 EVELYN WIMBERLEY

AGREED TO:

16
17 Date: June 16, 2016

18 By: _____
19 SHINERICH INDUSTRIAL, LTD.
20 SHINERICH INTERNATIONAL, INC.